



CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1239

[Docket No. CPSC-2019-0014]

Safety Standard for Gates and Enclosures

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: In July 2020, the U.S. Consumer Product Safety Commission (CPSC or Commission) published a consumer product safety standard for gates and enclosures under section 104 of the Consumer Product Safety Improvement Act of 2008 (CPSIA). The Commission's mandatory standard incorporated by reference the American Society for Testing and Materials (ASTM) voluntary standard that was in effect for gates and enclosures at the time, with modifications to make the standard more stringent, to further reduce the risk of injury associated with gates and enclosures. The CPSIA sets forth a process for updating mandatory standards for durable infant or toddler products that are based on a voluntary standard, when a voluntary standards organization revises the standard. In June 2021, ASTM published a revised voluntary standard for gates and enclosures, and it notified the Commission of this revised standard in July 2021. This direct final rule updates the mandatory standard for gates and enclosures to incorporate by reference ASTM's 2021 version of the voluntary standard for gates and enclosures.

DATES: The rule is effective on January 2, 2022, unless the Commission receives a significant adverse comment by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If the Commission receives such a comment, it will publish a document in the *Federal Register* withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of January 2, 2022.

ADDRESSES: You can submit comments, identified by Docket No. CPSC-2019-0014, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: <https://www.regulations.gov>. Follow the instructions for submitting comments. CPSC typically does not accept comments submitted by electronic mail (e-mail), except through <https://www.regulations.gov>. CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Mail/hand delivery/courier Written Submissions: Submit comments by mail/hand delivery/courier to: Division of the Secretariat, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504-7479. Alternatively, as a temporary option during the COVID-19 pandemic, you can email such submissions to: cpsc-os@cpsc.gov.

Instructions: All submissions must include the agency name and docket number for this document. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided, to: <https://www.regulations.gov>. Do not submit electronically: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to submit such information, please submit it according to the instructions for mail/hand delivery/courier written submissions.

Docket: For access to the docket to read background documents or comments received, go to: <https://www.regulations.gov>, and insert the docket number, CPSC-2019-0014, into the “Search” box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Justin Jirgl, Compliance Officer, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7814; email: jjirgl@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

A. Statutory Authority

Section 104(b)(1) of the CPSIA requires the Commission to assess the effectiveness of voluntary standards for durable infant or toddler products and adopt mandatory standards for these products. 15 U.S.C. 2056a(b)(1). The mandatory standard must be “substantially the same as” the voluntary standard, or it may be “more stringent than” the voluntary standard, if the Commission determines that more stringent requirements would further reduce the risk of injury associated with the product. *Id.*

Section 104(b)(4)(B) of the CPSIA specifies the process for when a voluntary standards organization revises a standard that the Commission incorporated by reference under section 104(b)(1). First, the voluntary standards organization must notify the Commission of the revision. Once the Commission receives this notification, the Commission may reject or accept the revised standard. The Commission may reject the revised standard by notifying the voluntary standards organization that it has determined that the revised standard does not improve the safety of the consumer product and that it is retaining the existing standard. When rejecting a revision, the Commission must notify the voluntary standards organization of this determination within 90 days of receiving notice of the revision. If the Commission does not take this action to reject the revised standard, the revised voluntary standard will be considered a consumer product safety standard issued under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the Commission received notification of the revision (or a later date specified by the Commission in the Federal Register). 15 U.S.C. 2056a(b)(4)(B).

B. Safety Standard for Gates and Enclosures

On July 6, 2020, under section 104 of the CPSIA, the Commission published a final rule that incorporated by reference ASTM F1004 – 19, *Standard Consumer Safety Specification for Expansion Gates and Expandable Enclosures*, as the mandatory standard for gates and

enclosures, with modifications to the standard to further reduce the risk of injury. 85 FR 40100. Modifications in the final rule included the following additional requirements, depending on the design of a pressure-mounted gate, to further reduce the risk of injury associated with incorrectly installed pressure-mounted gates:

- (1) For pressure-mounted gates that include wall cups with the product to meet the 30-pound push-out force test in the standard, the gates must include a separate warning label in a conspicuous location on the top rail of the gate regarding correct installation using wall cups, or
- (2) For pressure-mounted gates that do not use wall cups to meet the 30- pound push-out force test in the standard, the gates must use visual side-pressure indicators to provide consumers feedback as to whether the gate is correctly installed.

Id. The final rule is codified at 16 CFR part 1239. The rule for gates and enclosures applies to barriers “intended to be erected in an opening, such as a doorway, to prevent the passage of young children, but which can be removed by older persons who are able to operate the locking mechanism” (ASTM F1004 sec. 3.1.7) and “self-supporting barrier[s] intended to completely surround an area or play-space within which a young child may be confined” (ASTM F1004 sec. 3.1.6).

On July 6, 2021, ASTM notified CPSC that it had published a revised standard for gates and enclosures, ASTM F1004-21.¹ The revised voluntary standard was approved on May 15, 2021, and published in June 2021. In accordance with the procedures set out in section 104(b)(4)(B) of the CPSIA, the Commission reviewed ASTM F1004-21 to determine whether the revised voluntary standard improves the safety of gates and enclosures and found that ASTM substantively revised the voluntary standard to harmonize with the requirements of the current

¹ Until the standard becomes effective on January 2, 2022, a read-only copy of ASTM’s standard is available at: <https://www.astm.org/CPSC.htm>. After the effective date of the revised part 1239, ASTM F1004-21 becomes the mandatory standard for gates and enclosures, and it will be available, to read only, at: <https://www.astm.org/READINGLIBRARY/>.

mandatory standard for gates and enclosures. Based on CPSC’s review of ASTM F1004-21,² the Commission will allow the revised voluntary standard to become the mandatory standard for gates and enclosures without modification, because the revised performance requirements in ASTM F1004 – 21 are identical to 16 CFR part 1239, and thus, the revisions are neutral when compared with 16 CFR part 1239. Accordingly, by operation of law under section 104(b)(4)(B) of the CPSIA, ASTM F1004-21 will become the mandatory consumer product safety standard for gates and enclosures on January 2, 2022.³ 15 U.S.C. 2056a(b)(4)(B). This direct final rule updates 16 CFR part 1239 to incorporate by reference the revised voluntary standard, ASTM F1004-21, without modification.

II. Description of ASTM F1004-21

The ASTM standard for gates and enclosures includes performance requirements, test methods, and requirements for warning labels and instructional literature, to address hazards to infants and children associated with gates and enclosures. This is the first revision ASTM has made to the voluntary standard since the Commission published the final rule for gates and enclosures in July 2020, based on ASTM F1004-19. The June 2021 revision to the voluntary standard, ASTM F1004-21, includes editorial and substantive provisions.

ASTM made minor and editorial changes throughout ASTM F1004-21 including the following examples:

- Hyphenating multiple terms used as adjectives, such as “single-action,” “pressure-mounted,” “partially-bounded,” and “hold-open,” throughout;
- Correcting the spelling of “guage” to “gauge” in section 3.1.16;
- Adding conversions to Celsius in section 4.4;

² CPSC staff’s briefing memorandum regarding ASTM F1004-21 is available at: <https://www.cpsc.gov/s3fs-public/ASTMs-Revised-Safety-Standard-for-Gates-and-Enclosures.pdf?VersionId=PDxzSc9QGGUVWWsdoLv1iAA119Fd6P6Y>.

³ The statute provides that if the Commission does not take action to reject a revised standard, the revised voluntary standard will be considered a consumer product safety standard issued under section 9 of the Consumer Product Safety Act (15 U.S.C. 2058), effective 180 days after the Commission received notification of the revision (or a later date specified by the Commission in the *Federal Register*). 15 U.S.C. 2056a(b)(4)(B). In this case, 180 days from the July 6, 2021 notice date is January 2, 2022.

- Changing the capitalization of some terms, such as “Small Torso Probe” to “small torso probe”; and
- Changing unit expressions to bring the standard into accordance with ASTM Form and Style, such as adding a repeater unit when expressing a range (*e.g.*, “2 in. x 2 in.” instead of “2 x 2 in.”).

These changes are neutral and do not affect the safety of gates and enclosures.

ASTM also made three substantive revisions to the voluntary standard in ASTM F1004-21 to harmonize with the current mandatory standard for gates and enclosures codified in 16 CFR part 1239. The revised voluntary standard adds the following requirements:

- (1) A visual side-pressure indicator for pressure-mounted gates that do not incorporate wall-cups.

To implement this change, ASTM:

- (a) Added new definitions for “side-pressure” and “visual side-pressure indicators,” which are identical to those in 16 CFR 1239.2(b)(2)(i) and (ii);

- (b) Modified the directions for visual side-pressure indicators in the test method in 7.9.1.2 to be substantially identical to 16 CFR 1239.2(b)(4)(i);

- (c) Added a new section, 6.8, specifying requirements for visual side-pressure indicators. This section is substantially identical to the requirements in 16 CFR 1239.2(b)(3)(i) through (vi);

- (d) Added section 9.5 with instructional requirements for gates with visual side-pressure indicators, which is identical to the instructional requirements for gates in 16 CFR 1239.2(b)(8)(i); and

- (e) Added section X.1.2.5.4 to provide a rationale for the inclusion of visual side-pressure indicators in the rationale section, which is identical to 16 CFR 1239.2(b)(9)(i).

- (2) A wall-cup warning located on the top of the gate, by adding a new section 8.5.7, containing warning requirements for gates that use wall-cups or other mounting hardware to

meet the requirements of the push-out test in section 6.3. Such gates must display the following warning, separate from all other warnings, and located along the top rail of the gate:

You MUST install [wall-cups] to keep gate in place. Without [wall-cups], child can push out and escape.

This requirement is identical to the provisions in 16 CFR 1239.2(b)(7)(i) through (iv);

(3) Harmonization of the definition of “conspicuous” with 16 CFR part 1239 and other ASTM standards, by modifying the definition of “conspicuous” to use the definition as 16 CFR 1239.2(b)(1)(i), and by describing the adjective “conspicuous,” rather than defining an adjective with a definition that describes a noun (*i.e.*, a label).

Under CPSIA section 104(b)(4)(B), unless the Commission determines that ASTM’s revision to a voluntary standard that is referenced in a mandatory standard “does not improve the safety of the consumer product covered by the standard,” the revised voluntary standard becomes the new mandatory standard. As described above, ASTM F1004-21 is substantially identical to 16 CFR part 1239. Accordingly, ASTM F1004-21 is safety neutral when compared to 16 CFR part 1239. The Commission will allow ASTM F1004-21 to become the mandatory standard for gates and enclosures, and is updating 16 CFR part 1239 to reference this most recent updated voluntary standard, without modification.

III. Incorporation by Reference

Section 1239.2 of the direct final rule incorporates by reference ASTM F1004-21. The Office of the Federal Register (OFR) has regulations regarding incorporation by reference. 1 CFR part 51. Under these regulations, agencies must discuss, in the preamble to a final rule, ways in which the material the agency incorporates by reference is reasonably available to interested parties, and how interested parties can obtain the material. In addition, the preamble to the final rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR regulations, section **II. Description of ASTM F1004-21** of this preamble summarizes the major and revised provisions of ASTM F1004-21 that the Commission incorporates by reference into 16 CFR part 1239.⁴ The standard is reasonably available to interested parties in several ways. Interested parties can purchase a copy of ASTM F1004-21 from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428-2959 USA; phone: 610-832-9585; www.astm.org. Additionally, until the direct final rule takes effect, a read-only copy of ASTM F1004-21 is available for viewing on ASTM's website at: <https://www.astm.org/CPSC.htm>. Once the rule takes effect, a read-only copy of the standard will be available for viewing on the ASTM website at: <https://www.astm.org/READINGLIBRARY/>. Interested parties can also schedule an appointment to inspect a copy of the standard at CPSC's Division of the Secretariat, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone: 301-504-7479; email: cpsc-os@cpsc.gov.

IV. Certification

Section 14(a) of the Consumer Product Safety Act (CPSA; 15 U.S.C. 2051-2089) requires manufacturers of products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, to certify that the products comply with all applicable CPSC requirements. 15 U.S.C. 2063(a). Such certification must be based on a test of each product, or on a reasonable testing program, or, for children's products, on tests of a sufficient number of samples by a third party conformity assessment body accredited by CPSC to test according to the applicable requirements. As noted, standards issued under section 104(b)(1)(B) of the CPSIA are "consumer product safety

⁴ A detailed description of ASTM F1004-19 and the modifications made by the Commission in the final rule are also available in the final rule for gates and enclosures at 85 FR at 40104-05.

standards.” Thus, they are subject to the testing and certification requirements of section 14 of the CPSA.

Because gates and enclosures are children’s products, a CPSC-accepted third party conformity assessment body must test samples of the products for compliance with 16 CFR part 1239. Products subject to part 1239 also must comply with all other applicable CPSC requirements, such as the lead content requirements in section 101 of the CPSIA,⁵ the phthalates prohibitions in section 108 of the CPSIA⁶ and 16 CFR part 1307, the tracking label requirements in section 14(a)(5) of the CPSA,⁷ and the consumer registration form requirements in section 104(d) of the CPSIA.⁸

V. Notice of Requirements

In accordance with section 14(a)(3)(B)(iv) of the CPSIA, the Commission previously published a notice of requirements (NOR) for accreditation of third party conformity assessment bodies (third party labs) for testing gates and enclosures, and codified the requirement at 16 CFR 1112.15(b)(49). 85 FR at 40112. The NOR provided the criteria and process for CPSC to accept accreditation of third party labs for testing gates and enclosures to 16 CFR part 1239. *Id.* The Commission codified NORs for all mandatory standards for durable infant or toddler products in “Requirements Pertaining to Third Party Conformity Assessment Bodies,” 16 CFR part 1112.

Because ASTM F1004-21 is substantially identical to the existing mandatory standard for gates and enclosures, the Commission considers third party labs that are currently CPSC-accepted for 16 CFR part 1239 to have demonstrated competence to test gates and enclosures to the revised ASTM F1004-21, as incorporated into part 1239. Third party labs have already begun testing to part 1239 when it became effective on July 6, 2021. Accordingly, the existing accreditations that the Commission has accepted for testing to this standard will cover testing to

⁵ 15 U.S.C. 1278a.

⁶ 15 U.S.C. 2057c.

⁷ 15 U.S.C. 2063(a)(5).

⁸ 15 U.S.C. 2056a(d).

the revised standard. The existing NOR for the Safety Standard for Gates and Enclosures will remain in place, and CPSC-accepted third party labs are expected to update the scope of the third party lab's accreditations to reflect the revised gates and enclosure standard in the normal course of renewing their accreditations.

VI. Direct Final Rule Process

The Commission is issuing this rule as a direct final rule. Although the Administrative Procedure Act (APA; 5 U.S.C. 551-559) generally requires agencies to provide notice of a rule and an opportunity for interested parties to comment on it, section 553 of the APA provides an exception when the agency, "for good cause finds" that notice and comment are "impracticable, unnecessary, or contrary to the public interest." *Id.* 553(b)(B). The Commission concludes that when it updates a reference to an ASTM standard that the Commission incorporated by reference under section 104(b) of the CPSIA, notice and comment are not necessary.

Under the process set out in section 104(b)(4)(B) of the CPSIA, when ASTM revises a standard that the Commission has previously incorporated by reference under section 104(b)(1)(B) of the CPSIA, that revision will become the new CPSC standard, unless the Commission determines that ASTM's revision does not improve the safety of the product. Thus, unless the Commission makes such a determination, the ASTM revision becomes CPSC's standard by operation of law. The Commission is allowing ASTM F1004-21 to become CPSC's new standard. The purpose of this direct final rule is to update the reference in the Code of Federal Regulations (CFR) so that it reflects the version of the standard that takes effect by statute. This rule updates the reference in the CFR, but under the terms of the CPSIA, ASTM F1004-21 takes effect as the new CPSC standard for gates and enclosures, even if the Commission does not issue this rule. Thus, public comments would not alter substantive changes to the standard or the effect of the revised standard as a consumer product safety rule under section 104(b) of the CPSIA. Under these circumstances, notice and comment are unnecessary.

In Recommendation 95-4, the Administrative Conference of the United States (ACUS) endorses direct final rulemaking as an appropriate procedure to expedite rules that are noncontroversial and that are not expected to generate significant adverse comments. *See* 60 FR 43108 (Aug. 18, 1995). ACUS recommends that agencies use the direct final rule process when they act under the “unnecessary” prong of the good cause exemption in 5 U.S.C. 553(b)(B). Consistent with the ACUS recommendation, the Commission is publishing this rule as a direct final rule, because CPSC does not expect any significant adverse comments.

Unless CPSC receives a significant adverse comment within 30 days of this notification, the rule will become effective on January 2, 2022. In accordance with ACUS’s recommendation, the Commission considers a significant adverse comment to be “one where the commenter explains why the rule would be inappropriate,” including an assertion challenging “the rule’s underlying premise or approach,” or a claim that the rule “would be ineffective or unacceptable without change.” 60 FR 43108, 43111. As noted, this rule merely updates a reference in the CFR to reflect a change that occurs by statute.

If the Commission receives a significant adverse comment, the Commission will withdraw this direct final rule. Depending on the comment and other circumstances, the Commission may then incorporate the adverse comment into a subsequent direct final rule or publish a notice of proposed rulemaking, providing an opportunity for public comment.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601-612) generally requires agencies to review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603, 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As discussed in section **VI. Direct Final Rule Process** of this preamble, the Commission has determined that notice and the opportunity to comment are unnecessary for this rule. Therefore, the RFA does not apply. The Commission also notes the limited nature of this

document, which merely updates the incorporation by reference to reflect the mandatory CPSC standard that takes effect under section 104 of the CPSIA.

VIII. Paperwork Reduction Act

The current mandatory standard for gates and enclosures includes requirements for marking, labeling, and instructional literature that constitute a “collection of information,” as defined in the Paperwork Reduction Act (PRA; 44 U.S.C. 3501-3521). The revised mandatory standard for gates and enclosures does not alter these requirements. The Commission took the steps required by the PRA for information collections when it adopted 16 CFR part 1239, including obtaining approval and a control number. Because the information collection is unchanged, the revision does not affect the information collection requirements or approval related to the standard.

IX. Environmental Considerations

The Commission’s regulations provide a categorical exclusion for the Commission’s rules from any requirement to prepare an environmental assessment or an environmental impact statement where they “have little or no potential for affecting the human environment.” 16 CFR 1021.5(c)(2). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

X. Preemption

Section 26(a) of the CPSA provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the state requirement is identical to the Federal standard. 15 U.S.C. 2075(a). Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to CPSC for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA deems rules issued under that provision “consumer product safety standards.” Therefore, once a rule issued under section 104 of the CPSIA takes effect, it will preempt in accordance with section 26(a) of the CPSA.

XI. Effective Date

Under the procedure set forth in section 104(b)(4)(B) of the CPSIA, when a voluntary standards organization revises a standard that the Commission adopted as a mandatory standard, the revision becomes the CPSC standard within 180 days of notification to the Commission, unless the Commission determines that the revision does not improve the safety of the product, or the Commission sets a later date in the *Federal Register*. 15 U.S.C. 2056a(b)(4)(B). The Commission is taking neither of those actions with respect to the revised standard for gates and enclosures. Therefore, ASTM F1004-21 automatically will take effect as the new mandatory standard for gates and enclosures on January 2, 2022, 180 days after the Commission received notice of the revision on July 6, 2021. As a direct final rule, unless the Commission receives a significant adverse comment within 30 days of this notification, the rule will become effective on January 2, 2022.

XII. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801-808) states that before a rule may take effect, the agency issuing the rule must submit the rule, and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The CRA submission must indicate whether the rule is a “major rule.” The CRA states that the Office of Information and Regulatory Affairs (OIRA) determines whether a rule qualifies as a “major rule.”

Pursuant to the CRA, this rule does not qualify as a “major rule,” as defined in 5 U.S.C. 804(2). To comply with the CRA, CPSC will submit the required information to each House of Congress and the Comptroller General.

List of Subjects in 16 CFR Part 1239

Consumer protection, Imports, Incorporation by reference, Infants and children, Labeling, Law enforcement, Toys.

For the reasons discussed in the preamble, the Commission amends 16 CFR chapter II as follows:

PART 1239 – SAFETY STANDARD FOR GATES AND ENCLOSURES

1. Revise the authority citation for part 1239 to read as follows:

Authority: 15 U.S.C. 2056a.

2. Revise § 1239.2 to read as follows:

§ 1239.2 Requirements for gates and enclosures.

Each gate and enclosure shall comply with all applicable provisions of ASTM F1004-21, *Standard Consumer Safety Specification for Expansion Gates and Expandable Enclosures*, approved on May 15, 2021. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from ASTM International, 100 Barr Harbor Drive, PO Box C700, West Conshohocken, PA 19428-2959; phone: (610) 832-9585; www.astm.org. A read-only copy of the standard is available for viewing on the ASTM website at <https://www.astm.org/READINGLIBRARY/>. You may inspect a copy at the Division of the Secretariat, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone (301) 504-7479, email: cpsc-os@cpsc.gov, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email fr.inspection@nara.gov, or go to: www.archives.gov/federal-register/cfr/ibr-locations.html.

Alberta E. Mills,

Secretary,

Consumer Product Safety Commission.

[FR Doc. 2021-20851 Filed: 9/27/2021 8:45 am; Publication Date: 9/28/2021]